

1991

# The State of Utah v. John Charles Cloud : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH, :  
Plaintiff-Respondent, : Case No. 919884  
-v- :  
JOHN CHARLES CLOUD, : Priority No. 2  
Defendant-Appellant. :

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PETITION FOR REHEARING  
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PETITION FOR REHEARING IN AN APPEAL FROM A  
CONVICTION OF SECOND DEGREE MURDER, IN THE  
THIRD JUDICIAL DISTRICT COURT, IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH, THE  
HONORABLE HOMER F. WILKINSON, PRESIDING.

**UTAH SUPREME COURT  
BRIEF**

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**FILED**

JUN 24 1986

Clark, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff-Respondent,	:	Case No. 19884
-v-	:	
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STATEMENT OF THE ISSUES PRESENTED ON PETITION FOR REHEARING

The sole issue presented in this petition for rehearing is whether the Court misapprehended certain facts and law in concluding that the trial judge committed reversible error when he admitted certain photographs.

THE STATE OF UTAH, :  
 :  
 Plaintiff-Respondent, : Case No. 19884  
 :  
 -v- :  
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 JOHN CHARLES CLOUD, : Priority No. 2  
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 Defendant-Appellant. :

## STATEMENT OF THE CASE

## STATEMENT OF FACTS

## INTRODUCTION

To justify a rehearing, a strong case must be made. We must be convinced that the court

failed to consider some material point in the case, or that it erred in its conclusions, or that some matter has been discovered which was unknown at the time of the hearing.

4 Utah at 294, 11 P. at 512 (citation omitted). In Cummings v. Nielson, 42 Utah 157, 129 P. 619 (1913), the Court stated:

To make an application for a rehearing is a matter of right, and we have no desire to discourage the practice of filing petitions for rehearings in proper cases. When this court, however, has considered and decided all of material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result. . . . If there are some reasons, however, such as we have indicated above, or other good reasons, a petition for a rehearing should be promptly filed and, if it is meritorious, its form will in no case be scrutinized by this court.

42 Utah at 172-73, 129 P. at 624. The argument portion of this brief will demonstrate that, based on these standards, the State's petition for rehearing is properly before the Court and should be granted.

#### SUMMARY OF ARGUMENT

This Court in State v. Cloud, Utah, \_\_\_\_ P.2d \_\_\_\_, No. 19884 (filed May 23, 1986), misapplied the "essential evidentiary value" test, earlier established in State v. Garcia, Utah, 663 P.2d 60 (1983), by ruling that the trial judge abused his discretion in admitting the challenged color photographs. This Court also misapplied the "alternative means of evidence" analysis of Garcia, and unduly relied on certain "concessions" made by defense counsel during the motion to suppress and opening statement in reaching its decision.



This Court also failed to recognize the critical distinction between autopsy and crime scene photographs. Although the autopsy photographs arguably should have been excluded in this case under the essential evidentiary value test of Garcia, and after weighing their potential for prejudice, the crime scene photographs were properly admitted under the Garcia standard. These photographs, while admittedly gruesome, were essential to the State's prima facie case. They were the best available means of conveying relevant and essential information of defendant's mental state. This evidence could not have been conveyed to the jury as readily and accurately by alternative means which did not have the attendant risk of prejudice. This Court, therefore, incorrectly concluded that the crime scene photographs added nothing to what had already been introduced via testimony from both the medical examiner and police officers.

#### ARGUMENT

##### POINT I

THE COURT MISAPPLIED THE STANDARD OF  
STATE V. GARCIA, 663 P.2D 60 (Utah 1983).

It is beyond dispute that the proposed admission of potentially prejudicial photographs is governed by the standard enunciated by this Court in State v. Garcia, Utah, 663 P.2d 60 (1983). Garcia, requires that the prosecution demonstrate to the trial judge that the photographs' essential evidentiary value substantially outweighs the danger of undue prejudice which the jury's viewing of the photographs might create. Admittedly, this prosecutorial burden constitutes something more than the mere showing of the photographs' relevance. This Court in State v.

Cloud, Utah, \_\_\_\_ P.2d \_\_\_\_, No. 19884 (filed May 23, 1986), held that the photographs must convey relevant information that cannot readily be provided to the jury by less potentially prejudicial means." Cloud, slip op. at 3 (citation omitted). The Cloud Court further stated that:

even if the photograph is the best available means of conveying the relevant information, the essential evidentiary value of that information must still be balanced against the potential for unfair prejudice. Id.

Prior to any weighing, however, the trial court must first determine whether the photographs satisfy Garcia's essential evidentiary value test. Id. at 4. The majority in Cloud, concluded that "all the challenged photographs were inadmissible inasmuch as they held no essential evidentiary value" to the State's case against defendant. The photographs, according to this Court, added nothing to what was already before the jury readily and accurately by alternative means which were not accompanied by the potential prejudice.

In concluding that none of the challenged photographs had any essential evidentiary value to the prosecution's case, this Court has not only misapplied its own standard, earlier established in Garcia, to determine admissibility of gruesome color photographs, but it has also failed to recognize the fundamental and practical dynamics inherent in criminal trials, especially those involving a homicide. The misapplication of Garcia's essential evidentiary value test in Cloud approaches, in a practical sense, a new standard of per se inadmissibility for such photographs which clearly exceeds the Garcia standard and

compels future prosecutions to be held in sterile settings. Following Cloud, it is unclear when, if ever, the prosecution may introduce photographs as part of its case-in-chief.

This Court's misapplication of Garcia is partially explained by the undue reliance which the Court placed on alternative sources of evidence. This Court's conclusion that the photographs had no essential evidentiary value because they added nothing which was "put before the jury readily and accurately by other means not accompanied by the potential prejudice" further demonstrates a misapplication of Garcia. The Court in Cloud assailed the prosecutor's use of the photographs since the defendant "conceded" that he had committed the killing, that it had been done intentionally, and that defendant's victim had resisted the attack. It was further stated that defendant did not dispute either the medical examiner's testimony as to the time, place, or cause of death. This Court then pointed out that the medical examiner provided comprehensive testimony, through the use of a chart, regarding the condition of the body, including the location of the stab wounds, their depth, and the degree with which they were inflicted. There was also testimony from police officers as to the location, condition, and position of the body at the crime scene. Based on this evidence, the Cloud majority reasoned that four of the photographs--the picture of Johnson lying face up in a pool of coagulated blood and three autopsy pictures of defensive wounds to Johnson's hands and armpits--had no essential value, let alone relevancy to Cloud's single claim that he had killed Johnson due to extreme emotional distress.

This Court's impractical application of Garcia's "by other means" test has placed a virtually insurmountable onus on the prosecution to prove the essential value of photographs in the face of cumulative evidence. Garcia does not stand for such a proposition. The Garcia Court in fact hastened to point out:

We have frequently stated and applied the rule that color photographs of the body of the victim--even photographs that are gruesome--are not inadmissible if they are probative of essential facts, even though they may be cumulative of other evidence.

Garcia, 663 P.2d at 63. Just because photographs may be cumulative of other evidence does not mean that the photographs are inadmissible. If the evidence to which those photographs relate cannot be put before the jury readily and accurately by other means not accompanied by the potential prejudice, then its essential value will more than likely outweigh the risk of prejudice. Garcia, 663 P.2d at 64. By delineating the other evidence which was before the jury, this Court believes that the jury could be given an accurate picture of what happened on the day of the crime without admitting the gruesome photographs in question. Significantly, in Garcia, this Court sustained the admissibility of photographs which were similar to the ones introduced in the instant case on the grounds that they were corroborative of expert testimony or relevant to the defendant's mental state.

This Court also in Cloud unduly relied on the so-called "concessions" of defense counsel made during both the pre-trial motion to suppress and opening statement in determining whether the photographs had essential evidentiary value. Such

concessions, however, in the absence of a stipulation from defense counsel as to the State's proof, certainly do not render most or any elements of the second degree murder charge uncontested.

At the time that the motion was argued before the trial judge, there was certainly no guarantee that the defendant would personally testify and admit that he had committed the killing, that it had been done intentionally or knowingly, or that he intended to cause serious bodily injury and committed an act clearly dangerous to human life. (See Utah Code Ann. § 76-5-203(a) and (b) (1953), as amended), and that his victim had resisted the attack. The fact that Cloud eventually took the stand and made numerous concessions has very little, if any, relevance to this Court's determination of whether the trial judge's decision, prior to trial regarding the evidentiary value of the photographs, was an abuse of discretion. No matter how many concessions were orally made by defense counsel during his motion to suppress and opening statement to the jury, the State was not relieved of its burden of proving defendant's guilt beyond a reasonable doubt of every element of second degree murder. Since none of the representations made by defense counsel during both the motion and opening statement as to the conceded issues were binding on the prosecutor or the trial court and could not be considered as evidence by the jury, see State v. Erwin, 101 Utah 365, 120 P.2d 285, 313 (1941) (remarks by counsel during opening statement to the jury are not evidence), this Court's reliance on them in finding the photographs inadmissible

is clearly incorrect. The fact remains that only at the conclusion of trial did the defendant's asserted mitigating factors of extreme emotional distress become the focus of the jury's deliberation. To view it otherwise would be to ignore the critical chronology of a criminal trial.

When the Garcia essential evidentiary value test is properly applied to the photographs in the instant case, the misapplication of the Garcia test in Cloud becomes quite evident. Arguably, the three close-ups of three defense wounds suffered by Johnson--one in the armpit and two in the hands--should not have been admitted on the theory that this case, their essential evidentiary value was not shown. The medical examiner's detailed testimony of the location of the defensive stab wounds to the victim's hands and armpits, particularly with respect to their depth and the force with which they were inflicted, readily and accurately conveyed to the jury the essential information which the prosecutor desired without the attendant risk of prejudice carried by the autopsy photographs. The introduction of these photographs by the trial judge, however, constituted harmless error in light of the overwhelming evidence against defendant and the minor cumulative impact the autopsy photographs could have had. See State v. Wells, 603 P.2d 810, 813 (Utah 1979). This is not to say, however, that under the Garcia standard there are no cases where autopsy photographs' essential evidentiary value can be established and will substantially outweigh the potential for prejudice. Unlike the circumstances in the instant case, there are cases where autopsy photographs are critical in establishing

the entrance and exit of a bullet or in resolving a "battle of the experts."

Unlike the autopsy photographs, in the instant case, the essential evidentiary value of the crime scene photographs was established and substantially outweighed the potential for unfair prejudice, in light of the fact that this evidence could not be readily and accurately conveyed to the jury by alternative means which were unencumbered by the risk of prejudice. This Court, therefore, was incorrect in concluding that the crime scene photographs added nothing which was already presented by means of police officer and medical examiner testimony.

In virtually every case, a witness could describe what is depicted in a photograph. However, even the most skilled and articulate of police officers will offer testimony which is replete with obvious inadequacies and inaccuracies not found in the crime scene photographs which objectively detail and specify what occurred. In the instant case, there was simply no better, more accurate and demonstrative way of presenting essential and subtle details to the jury than through the Exhibits #6 and #15.

These exhibits were critical to the issue of defendant's mental state at the time the homicide was committed under all theories charged (intentional or knowing killing or intending to cause serious bodily injury, he commits an act clearly dangerous to human life that causes the death. See Utah

Code Ann. § 76-5-203(a) and (b) (1953), as amended.)<sup>1</sup> It should be noted that the prosecution, in a case involving an anticipated defense of emotional disturbance, must, practically speaking, prove that the defendant was not acting under the influence of extreme mental or emotional disturbance. Thus, the crime scene photographs in Cloud were necessary and relevant to support the State's theory that the ferocity of the attack, as accurately depicted in the photographs, demonstrated that this particular murder was intentional or knowing, or was an act clearly dangerous to human life, unfettered by defendant's claim of mental or emotional disturbance. Defense counsel's concessions prior to trial and during opening argument did not obviate the need and essential importance of these particular photographs which were at the heart of the State's charge of second degree murder.

Further, consideration must also be given to the differences between crime scene photographs and autopsy photographs. Crime scene photographs frequently constitute the primary evidence from which the jury draws its inferences and conclusions as to whether the defendant has committed the crime for which he has been charged. These photographs, thus, are of essential value to prove the actus reus and mens rea of the crime. On the other hand, when expert testimony is not in

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<sup>1</sup> Notably, in Garcia, this Court found a closeup photograph of the victim's torso and head showing numerous stab wounds relevant to show the nature of the victim's wounds as "clearly dangerous to human life" and to assailant's "depraved indifference to human life" (two mental states under the second degree murder statute. See Utah Code Ann. § 76-5-203(b) and (c) (1953, as amended).



dispute, autopsy photographs are often utilized by the prosecution to refine and amplify the primary evidence of the case-in-chief. In such cases, therefore, there might be less essential evidentiary value to support the admission of the autopsy photographs. However, the fact that the need for such scientific evidence is less in a given case should not bar the admission of crime scene photographs which, albeit gruesome, accurately depict what happened on the day of the crime. The crime scene photographs more accurately depicted what occurred and the trial judge was therefore correct in admitting them for their relevance to the issue of defendant's mental state. Consequently, the prosecution was allowed to include these essential photographs as part of its case against the defendant and the jury deserved the opportunity to observe what actually happened to Johnson in the most accurate and precise way possible. Garcia, does not mandate sanitized prosecutions, only those which are fair, accurate, and not unduly prejudicial. The trial judge, thus, correctly admitted these photographs consistent with the essential evidentiary value test of Garcia.

Finally, the fact that the prosecutor, in the instant case, may have placed too much importance on the photograph which depicted the victim lying face-down in a pool of blood with her middle finger extended in an obscene gesture, in his closing argument to the jury, relates to the issue of prosecutorial error at the close of trial not to the question of admissibility of any of the photographs at the beginning. The prosecutor's possible strategic error in argument at the close of trial clearly does

not relate back to his good faith efforts at the beginning of trial to introduce the photographs. Accordingly, the prosecutor's preoccupation with a single photograph during closing argument does not raise either a strong or even reasonable inference that the entire prosecution was tainted by a dubious and reprehensible motive on the part of the State to inflame the jury. To accept a different interpretation of the prosecutor's motive is to confuse the issues of the prosecutor's advocacy with the photographs' admissibility.

#### CONCLUSION

Based upon the foregoing discussion, it appears that the Court has misapprehended previous case law in concluding that the challenged photographs were inadmissible due to their lack of essential evidentiary value. Consequently, the State's petition for rehearing should be granted and this case should be restored to the calendar for either reargument or resubmission. See Utah R. App. P. 35(c) (1985). Alternatively, the Court should modify or clarify its opinion to reflect a proper application of State v. Garcia, Utah, 663 P.2d 60 (1983).

The State certifies that this petition is presented in good faith and not for purposes of delay.

DATED this 24<sup>th</sup> day of June, 1986.

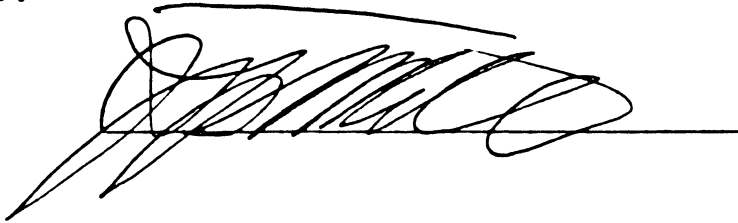
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Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing Petition for Rehearing, postage prepaid, to F. John Hill, attorney for appellant, Salt Lake Legal Defender Association, 333 South Second East, Salt Lake City, Utah 84111, this 24<sup>th</sup> day of June, 1986.

A handwritten signature in black ink, consisting of a series of loops and strokes, positioned above a horizontal line.

## **ADDENDUM**

## APPENDIX A

IN THE SUPREME COURT OF THE STATE OF UTAH

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The State of Utah,  
Plaintiff and Respondent,

v.

John Charles Cloud,  
Defendant and Appellant.

No. 19884

F I L E D  
May 23, 1986

Geoffrey J. Butler, Clerk

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ZIMMERMAN, Justice:

Defendant John Cloud appeals from a jury verdict convicting him of second degree murder. Cloud asserts that the trial court erred in admitting photographs of the victim and in refusing his proffered jury instructions. He also claims that the evidence was insufficient to sustain the conviction. We agree that the trial court abused its discretion in admitting the photographs and reverse and remand for a new trial.

On the morning of May 23, 1983, the body of Nyla Johnson was found in her apartment. Johnson had died of multiple stab wounds inflicted several hours earlier by her fiance, defendant John Cloud. The homicide apparently occurred after a lengthy argument between Johnson and Cloud, in which Johnson told Cloud that she intended to break their engagement. Cloud was in the apartment when the body was discovered. He initially maintained that Johnson had been attacked by an unknown assailant, but later admitted killing her.

Cloud was charged with second degree murder under U.C.A., 1953, § 76-5-203(a) and (b) (Repl. Vol. 8B, 1978, Supp. 1985). At trial, the State introduced several photographs of the victim that showed the following: (i) Johnson as she was discovered by the police, fully clothed, lying face down on the floor in a pool of coagulated blood with the middle finger of her left hand extended in what the State claimed was an obscene gesture; (ii) the body after it had been turned over, lying face up in the pool of blood; and (iii) close-ups of three defensive wounds suffered by Johnson, one in the armpit and two on her hands. The State used these photographs to argue that, given the nature of the attack and the number of wounds inflicted, Cloud acted with the intent necessary to sustain a conviction of second degree murder. In his defense, Cloud asserted that his

alcoholism, coupled with his distress over a prior divorce and the traumatic prospect of another failed relationship, had created an extreme emotional disturbance so that his actions amounted at most to manslaughter. U.C.A., 1953, § 76-5-205(b) (Repl. Vol. 8B, 1978, Supp. 1985). At the close of the evidence, the trial court instructed the jury on second degree murder and manslaughter. The trial court refused to give three of defendant's instructions relative to manslaughter. The jury thereafter found Cloud guilty of second degree murder.

On appeal, Cloud argues that the trial court erred in admitting the photographs and in refusing to give certain requested jury instructions. He also contends that the evidence was insufficient to sustain the conviction of second degree murder. We first address Cloud's contention that the admission of the photographs constituted reversible error.

The admission of photographic evidence depicting crime scenes and victims' injuries is governed by Utah Rule of Evidence 45, which provides that a "judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will . . . (b) create substantial danger of undue prejudice . . . ." <sup>1</sup> This Court has considered the admissibility of such photographs in a number of cases. See, e.g., State v. Garcia, Utah, 663 P.2d 60 (1983); State v. Wells, Utah, 603 P.2d 810 (1979); State v. Ross, 28 Utah 2d 279, 501 P.2d 632 (1972); State v. Poe, 21 Utah 2d 113, 441 P.2d 512 (1968) (Poe I); cf. State v. Poe, 24 Utah 2d 355, 471 P.2d 870 (1970) (Poe II). State v. Garcia best summarizes the applicable law. Garcia indicated that under Rule 45 and our prior cases, when the prosecution proposes to introduce gruesome photographs of a homicide victim, the trial court

should determine whether the viewing of the photographs by the jury would create a substantial danger of undue prejudice against the defendant, and if so, whether that danger substantially outweighs the photographs' essential evidentiary value. The more inflammatory the photograph, the greater the need to establish its essential evidentiary value . . . .

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1. Rule 45 was superseded by Utah Rule of Evidence 403, which applies to the present case. Rule 403 provides in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." The language of this rule varies slightly from old Rule 45; however, the two are substantively identical, and the appropriateness of the analysis set forth in Garcia is unaffected by this change.

663 P.2d at 64 (emphasis in original; citation omitted).

The Court then explained what it meant by balancing the "essential evidentiary value" of a photograph against its potential prejudicial impact:

The point of the reference to "essential evidentiary value" in the context of potentially prejudicial photographs of the victim's body is that such photographs would generally be inappropriate where the only relevant evidence they convey can be put before the jury readily and accurately by other means not accompanied by the potential prejudice.

663 P.2d at 64 (latter emphasis added). Clearly, it is not enough that a potentially prejudicial photograph convey relevant information; it must convey relevant information that cannot readily be provided to the jury by less potentially prejudicial means. See State v. Wells, Utah, 603 P.2d 810, 813 (1979). Moreover, even if the photograph is the best available means of conveying the relevant information, the essential evidentiary value of that information must still be balanced against the potential for unfair prejudice.

Of course, because the admission of such evidence under Rule 45 (and its successor, Rule 403) is a matter addressed to the sound discretion of the trial court, a trial court's decision to admit photographic evidence will not be overturned absent an abuse of discretion. State v. Garcia, 663 P.2d at 64. Such an abuse of discretion occurred in Poe I, where the trial court admitted autopsy photographs of a homicide victim's dissected brain cavity to illustrate the path of the fatal bullets. There was no question in that case that the victim had died as the result of bullet wounds to the head. This Court held that it was reversible error to admit the photographs when "[a]ll the material facts which could conceivably have been adduced from a viewing of the slides had been established by uncontradicted lay and medical testimony" and the sole purpose for introducing the evidence was to "inflame and arouse the jury." 21 Utah 2d at 117, 441 P.2d at 515. In State v. Wells, the Court also found that photographs of a homicide victim had no essential evidentiary value because the evidence depicted was already before the jury through the testimony of the medical examiner and that evidence was not contested by the defendant; therefore, the photographs were "superfluous" and had no evidentiary value except the "hoped-for emotional impact on the jury." 603 P.2d at 813. The conviction was not reversed, however, because the error was found to be harmless. Id.



In the present case, Cloud argues that the introduction of the photographs constituted reversible error because they were unnecessarily gruesome and had no probative value as to any disputed issues in the case. The State, on the other hand, argues that the photographs were relevant to three critical issues: the autopsy photographs of the stab wounds illustrated the brutality of Cloud's attack; the photograph depicting coagulated blood on Johnson's body assisted in determining when the crime occurred; and the photograph with the allegedly obscene gesture was illustrative of Cloud's mental state.

Both before the trial court and here, the State misperceives the standard laid down in Garcia for judging the admissibility of gruesome color photographs. This is best illustrated by the record of the lengthy hearing held before the trial judge on defendant's motion to preclude admission of the photographs. During the hearing, all parties conceded that the photographs were very graphic and gruesome. Defense counsel argued that the photographs showed nothing that could not be established by other readily available evidence. The judge repeatedly quizzed the prosecutor as to what the photographs would prove that was not conceded by defendant or that could not be proven through other nonobjectionable evidence. The prosecutor did not suggest that the photographs had any "essential evidentiary value," as that term is explained in Garcia. Rather, he argued that they were admissible because they contained relevant evidence. After extensive argument, the trial court apparently accepted the prosecution's statement of the law and denied the motion to exclude. In so doing, the court erred.

Under Garcia, potentially prejudicial photographs are "generally inappropriate" and should not be admitted in evidence unless they have some essential evidentiary value that outweighs their unfairly prejudicial impact. 663 P.2d at 64. Only after a determination has been made that the photographs have such value need the weighing be made. The trial court misapprehended the law and for that reason admitted the photographs without first properly evaluating the evidence. The trial judge's observation that the issues for which the photographs were offered were conceded makes it fairly plain that the photographs were not admitted for their essential evidentiary value. Regardless of how the matter is viewed, the conclusion is inescapable that the photographs had no essential evidentiary value. All that they showed was "put before the jury readily and accurately by other means not accompanied by the potential prejudice." Id. Under these circumstances, we can only conclude that the photographs were proffered and used solely for the purpose condemned in Poe I and in Wells--to inflame the jury.

The State contends that four of the photographs--the picture of Johnson lying face up in a pool of coagulated blood and three pictures of specific stab wounds to the hands and armpits--show the number and location of the wounds, thus illustrating the brutality of the attack, and that the coagulated blood is probative of the time of death. In these respects, the pictures add nothing to what was already before the jury. Cloud had conceded that he had committed the killing, that it had been done intentionally, and that Johnson resisted the attack. Nor did Cloud dispute either the medical examiner's testimony as to the time and place of death or the cause of death. The examiner also testified in detail regarding the condition of the body, including the location of each of the 27 stab wounds, their depth, and the force with which they were inflicted. This testimony was aided by a chart of the body indicating the position of the body and the location of the critical wounds. Police officers also testified as to the location, condition, and position of the body at the crime scene. Cloud's only contention was that the mental stress under which he was acting required a finding that the homicide was merely manslaughter rather than second degree murder. The photographs were not relevant in any way in rebutting Cloud's assertion that he was influenced by extreme emotional distress.

On appeal, the State also argues that the photograph showing an allegedly obscene gesture by the victim indicated that she defied Cloud and that this motivated him to kill her. This ground for admitting the photograph was not specifically advanced to the trial judge during the hearing on the motion to exclude the pictures, but arose during final argument when the prosecutor used the photograph showing the gesture to argue the defiance theory to the jury. The claim of essential evidentiary value for this photograph does not survive analysis. The record does not support a finding that evidence of this gesture could not have been presented to the jury readily and accurately by other means, such as the testimony of the investigating officers or the medical examiner.

It is also worth noting that there is nothing in the record to support the prosecutor's claim that the photograph shows that the victim made an obscene gesture to Cloud before he killed her. This claim, of course, provided the basis for the prosecutor's closing argument to the jury that Cloud killed her because of the "defiance" shown by the gesture.<sup>2</sup>

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2. During his closing, the prosecutor repeatedly held up Exhibit 6, which depicted Johnson's body with the middle finger of her left hand extended. He argued that the photograph illustrated Cloud's state of mind--that he calmly

Absent some foundation for the speculation that the gesture was made volitionally by the victim, the gesture depicted in the photograph cannot serve to give the photograph relevance, much less essential evidentiary value.<sup>3</sup>

The foregoing analysis indicates that the trial court abused its discretion in admitting the photographs. The critical question is whether that error was harmless. A conviction will not be reversed because of the erroneous admission of evidence absent a showing that the error likely affected the substantial rights of the defendant. Utah R. Evid. 103(a); U.C.A., 1953, § 77-35-30(a) (Repl. Vol. 8C, 1982).

The sole issue before the jury was whether Cloud was acting under extreme emotional distress so that the homicide amounted only to manslaughter; there was no issue as to the intentional nature of the killing or the ferocity of the attack. As noted above, the photographs had no essential evidentiary value as to any issue in the case and were arguably not even relevant to the central point--the stress under which defendant was laboring. Yet the prosecutor fought doggedly to get them into evidence during a lengthy hearing on Cloud's motion to exclude, arguing that they were relevant to the issue. At trial, the photographs were central to

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(Footnote 2 continued.)

and coldly murdered Johnson because she "defied" him. For example, the prosecutor argued:

[Johnson] defied [Cloud] - and you see  
that last act of defiance in the  
photographs . . . .

. . . .  
This selfish individual continues to  
stab this lady who defied him, and that  
alone is the basis for the killing.

. . . .  
She defied him and therefore caused  
him to take her life. There was a reason  
for the killing and it was that defiance.  
And how do we know that? It was that last  
act of defiance (displays exhibit).

There was no evidence to suggest that the position of Johnson's hand was volitional. Given the extensive wounds to the hands, it might as easily have been attributable to a severed tendon or to rigor mortis.

3. In addition, the lack of foundation for the inference drawn by the prosecutor in closing raises questions as to the propriety of the argument presented to the jury and the use made of the photograph in the course of that argument. However, defense counsel made no objection to the argument and has not raised the matter on appeal. Therefore, we decline to reach the issue.

the presentation of his case. Not only were all the pictures shown to the jury, but the prosecutor's closing argument focused entirely on the photograph depicting the victim face down in a pool of coagulated blood with the middle finger of her left hand extended. See footnote 2, supra. This is not a case, then, in which improperly admitted evidence is peripheral. Rather, the improperly admitted photographs here were the focus of much of the prosecutor's presentation of his case, and the inference is strong that they were used primarily to inflame the jury. Under the circumstances, we cannot say that their admission was harmless error. See Poe I, 21 Utah 2d at 117-18, 441 P.2d at 515. Therefore, the conviction must be reversed and the case remanded for a new trial.

Because this case almost certainly will be retried, in the interest of judicial economy it is appropriate for us to comment on Cloud's other contentions on appeal that will arise again upon retrial. "[W]hen a new trial or further proceeding is ordered, it is our duty to pass upon questions of law which may be pertinent and helpful in arriving at a final determination of the case." Lopes v. Lopes, 30 Utah 2d 393, 518 P.2d 687, 688 (1974); accord LeGrand Johnson Corp. v. Petersen, 18 Utah 2d 260, 420 P.2d 615 (1966); Anderson v. Utah County Board of County Commissioners, Utah, 589 P.2d 1214 (1979). Those contentions relate to the trial court's refusal to give Cloud's proffered instructions relating to the circumstances under which Cloud should be convicted of manslaughter rather than second degree murder. We consider only the trial court's refusal to give instructions No. 7 and No. 24.<sup>4</sup>

The jury was informed that if the State established that a homicide had been committed but failed to prove any of the elements of second degree murder beyond a reasonable doubt, it "should consider" the lesser included offense of manslaughter. Cloud's proposed instruction No. 24 instructed

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4. Cloud claims that the trial court erroneously refused to give his proffered instruction No. 21. Cloud's counsel failed to object at trial to the court's failure to give that instruction, which would have instructed the jury that "[w]hen a homicide which would otherwise be murder in the second degree is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation, then the offense constitutes manslaughter." Failure to object usually results in a waiver, State v. Malmrose, Utah, 649 P.2d 56, 58 (1982), although this Court may consider a matter if the error plainly affects a defendant's substantial rights. Under the circumstances before us, we find that the jury was adequately instructed on the lesser included offense of manslaughter. Therefore, we find no plain error in the court's failure to give instruction No. 21.

the jury that if it found that Cloud had committed a homicide and there was a reasonable doubt as to which degree of homicide he had committed, it "must convict" Cloud of manslaughter. That instruction, couched in mandatory terms, was close to the language of section 77-17-1 of the Code; which provides: "When it appears the defendant has committed a public offense and there is reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lower degree." U.C.A., 1953, § 77-17-1 (Repl. Vol. 8C, 1982) (emphasis added). While the instruction actually given by the court attempted to assist the jury in determining when Cloud should be convicted of manslaughter rather than second degree murder, it was not entirely clear. When it is plain that a defendant has committed some crime, section 77-17-1 reflects an important policy of resolving reasonable doubts as to the degree of guilt in the defendant's favor. Therefore, jury instructions on this point should follow the statutory language as closely as possible. On retrial, the trial court should not refuse to give a jury instruction that tracks the statutory language.

Cloud's proffered instruction No. 7 informed the jury that he was not to be found guilty unless the evidence "exclude[d] every reasonable hypothesis other than that of the guilt of the defendant." We have repeatedly held that if the jury is clearly informed of the standard of proof beyond a reasonable doubt, no "reasonable alternative hypothesis" instruction is required. State v. Eagle, Utah, 611 P.2d 1211, 1213 (1980); State v. Burton, Utah, 642 P.2d 716, 719 (1982). Viewing the jury instructions as a whole, State v. Brooks, Utah, 638 P.2d 537, 542 (1981), we conclude that the jury was adequately instructed about the elements of the crime charged and the standard of proof required. Cloud's claim of error in the trial court's refusal to give instruction No. 7, therefore, is without merit.

The conviction is reversed. The matter is remanded for a new trial.

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WE CONCUR:

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I. Daniel Stewart, Justice

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Christine M. Durham, Justice

HALL, Chief Justice: (Dissenting)

I am not persuaded that on the facts of this case the trial court abused its discretion by receiving the photographs of the crime into evidence.

The burden was upon the State to prove the essential elements of the offense of second degree murder as charged. Second degree murder is the unlawful killing of a human being with malice aforethought, while manslaughter is the unlawful killing of a human being without malice.<sup>1</sup>

Inasmuch as defendant admitted the killing, the basic issue at trial was one of his intent in doing so. Defendant testified that he was suffering from extreme mental or emotional distress, and therefore the element of malice was absent from his actions in taking the life of the victim. Consequently, he could at most be convicted of manslaughter. The State was thus put to the task of proving the essential element of malice.

It is not disputed that the photographs accurately depict the condition of the victim at the scene of the crime. The photographs depict the nature and extent of the numerous wounds inflicted and the atrocity of the crime and are therefore competent, relevant, and material to the issue of intent.

All evidence tends to prejudice the jury, and photographs are no exception. The fact that the photographs depict a gruesome scene created by defendant is no reason to exclude them from evidence if they are otherwise admissible. Also, it is not a valid objection that oral testimony has been offered regarding the detail shown by the photographs because photographs give a much clearer impression than does an oral description.

Applying the essential evidentiary value test as espoused by the Court in State v. Garcia,<sup>2</sup> I would affirm the conviction and judgment of the trial court.

Howe, Justice, concurs in the dissenting opinion of Chief Justice Hall.

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1. Farrow v. Smith, Utah, 541 P.2d 1107, 1109 (1975). See also U.C.A., 1953, §§ 76-5-203, 76-5-205.

2. Utah, 663 P.2d 60, 63-64 (1983).